POWER OF COURTS OF EQUITY TO REFORM WRITTEN EXECUTORY CONTRACTS FOR THE SALE OF LAND AND DECREE SPECIFIC PERFORMANCE OF THE CONTRACT AS REFORMED.—As a general rule, a court of equity has the power to reform on the strength of oral testimony alone, a written contract which, through a mutual mistake of the parties or through an error of the scrivener who reduced the oral agreement to writing, does not contain the terms intended; and having rectified the mistake so as to make the contract conform to the intention of the parties, the court will proceed to enforce it.[1] The question to be discussed is, how far will the operation of the fourth section of the statute of frauds permit the above rule to apply to an executory written contract for the sale of land or interest therein, when the remedy sought is reformation of the contract followed by specific performance of the reformed instrument. This proposition may be considered under three heads: I. Where through inadvertence the written agreement contains more than was intended; II. where some of the terms of the agreement have been omitted by mistake from the written contract, but there has been a technical part performance of the whole; and III. where the written agreement, through mistake, does not contain all the terms as intended and there has been no part performance.

I. Where the written executory agreement contains through mistake more than was intended, the plaintiff vendor, should he desire relief from the error, may prove the mistake by parol evidence, have the contract reformed in accordance with the true intention of the parties, and in addition obtain a decree of specific performance of the contract as reformed.[2] Likewise, the vendor can resist by the introduction of parol evidence a suit for specific performance, until the contract is so reformed as to express the true agreement.[3] In the case under consideration the statute of frauds is not involved. The effect of the parol evidence is merely to nullify that portion of the written contract to which it relates, leaving the rest to be specifically enforced.[4] The contract of which specific performance is decreed, though not containing all the terms as originally embodied therein, is nevertheless a written contract and, hence, sufficient to satisfy the statute of frauds.[5]

II. Where owing to a mistake, some of the terms of the oral agreement have not been incorporated in a written contract to convey land, there has been however, a technical part performance of the whole agreement, equity will reform the contract so as to make it include all the intended terms and will then decree

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[1] Holden *v.* Law, etc., Co. (Ore.), 127 Pac. 547; Martin *v.* Hemstead (Ark.), 135 S. W. 453.

[2] Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418 (*dictum*); 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 865, *et seq.*

[3] BISPHAM, PRINCIPLES OF EQUITY, 2 ed., 437, *et seq;* 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 860, *et seq.*

[4] LILE, NOTES ON EQUITY JURISPRUDENCE, 80.

[5] BISPHAM, PRINCIPLES OF EQUITY, 2 ed., 439, *et seq.*

specific performance of the contract as reformed.[6] This is merely in accordance with the usual rule that, where an oral agreement for the sale of land has been partly performed, it is thereby taken out of the operation of the statute of frauds and entitled to the same respect as if it were in writing.[7] Otherwise the statute, which was meant to prevent fraud would engender, rather than serve as an antitoxin for this contractual disease.[8]

III. Cases where the written executory agreement, through mistake, does not contain all the terms intended, and there has been no part performance of the whole, give rise to a state of affairs that has caused the courts considerable trouble.[9] The so-called American view is to the effect that the plaintiff vendee may allege the mistake made in reducing the contract to writing and on the basis of parol evidence have inserted in the contract any term erroneously omitted, and then have the contract specifically enforced as reformed. This doctrine originated in a *dictum* in the case of *Gillespie* v. *Moon,*[10] to the effect that a term could be added by parol evidence to an executory written contract for the sale of land and that the contract as reformed could then be specifically enforced. The reasoning of this line of authority seems to be that, in case of a mistake made in reducing an agreement to writing, equity has the power to reform the written contract by receiving parol evidence as to the true intention of the parties, and then when the term is so established, it is as if it were written in the contract from the beginning and, therefore, entitled to the remedy of specific performance.[11]

The courts that refuse to follow the rule laid down above have

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[6] Tilton *v.* Tilton, 9 N. H. 385; Popplein *v.* Foley, 61 Md. 381; Waldron *v.* Waller, 65 W. Va. 605, 64 S. E. 964.

[7] BISPHAM, PRINCIPLES OF EQUITY, 2 ed., 440, *et seq.*

[8] 3 JONES COMMENTARIES ON EVIDENCE, § 432, *et seq.*

[9] 2 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 862; Keisselbrack *v.* Livingston, 4 Johns. Ch. (N. Y.) 144 (part performance was also a basis of decision in this case); Murphy *v.* Rooney, 45 Cal. 78; Hughes *v.* Payne, 22 S. D. 393, 117 N. W. 363. See also, Craig *v.* Kittridge, 23 N. H. 231; Depeyster *v.* Hasbrouck, 11 N. Y. 582; Vincent *v.* Collins (Ky.), 32 S. W. 1096. In these cases one party had changed his position because of the belief that the written contract contained all the terms intended, such change, however, not amounting to a part performance. It was held, without mentioning the statute of frauds, that the contract would be reformed by oral testimony and specifically enforced as reformed. It is to be noted that the last case was not contested.

[10] 2 Johns. Ch. (N. Y.) 585. In this case the vendor, in attempting to convey two hundred acres of land, through mutual mistake actually conveyed two hundred and fifty acres by the terms of the deed. It was properly held that parol evidence was admissible to establish the mistake, and that the deed would be reformed to conform to the true intention of the parties and specifically enforced as reformed. As the contract involved was executed and not executory, as it was reformed so as to subtract from its terms and not to add to them, and as the effect of the statute of frauds was not discussed, this *dictum* would seem to be of little value.

[11] Keisselbrack *v.* Livingston, *supra.*

adopted what is known as the English view. According to this doctrine, where an executory written contract for the sale of such an interest in land as comes within the statute of frauds does not contain all the terms required by the statute, even though the terms were omitted through mistake, equity has no power to establish these terms by parol testimony and decree specific performance of the contract as reformed.[12] The courts that adhere to this view contend that the very basis of the theory upon which parol evidence is admissible to show a mistake and to establish terms other than those contained in the writing, is that the writing does not evidence the entire contract but only a part of it.[13] Consequently when a term is established by parol evidence, it is not thereby raised to the dignity of a written term, but becomes merely a parol element of a composite contract.[14] Inasmuch as the contract as reformed is partly oral and partly written, and all remedy is taken away on an oral executory contract that comes within the purview of the statute of frauds, such a contract cannot be enforced.[15] The purpose of the statute is to avoid fraud arising from perjury, uncertain recollection, and mistaken understandings, which are peculiarly incident to oral contracts, and to enforce a contract, some of the terms of which must be established by parol, would serve to defeat this object.[16] But even under this holding, parol evidence will be received of course to establish the mistake for the purpose of rescinding the contract; and in addition to such rescission, the plaintiff will be allowed to recover anything which he has parted with to the defendant because of the contract.[17]

In the recent case of *Vogt et al.* v. *Mullin* (N. J.), 89 Atl. 533, there was a failure through mutual mistake to mention in a written executory contract for the sale of land the fact that it was subject to a right of way. The contract contained an express agreement that the vendor would convey the land free from all encumbrances. It was held that equity would not reform the contract and then decree its specific performance against the vendee.

WAIVER OF FORFEITURE BY FIRE INSURANCE COMPANIES.—Probably no topic of insurance law is subject to greater diversity of opinion and authority than is the doctrine of election of grounds

[12] Woolam *v.* Hearn, 7 Ves. Jr. 211; Glass *v.* Hulbert, *supra;* Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810; Macomber *v.* Peckham, 16 R. I. 485, 17 Atl. 910; Safe Deposit Co. *v.* Diamond, etc., Co. (Pa.), 83 Atl. 54; Baume *v.* Morse, 13 Cal. App. 456, 110 Pac. 350; Wirtz *v.* Guthrie, 81 N. J. Eq. 271, 87 Atl. 134.

[13] GREENLEAF, EVIDENCE, 16 ed., § 284a; 3 JONES, COMMENTARIES ON EVIDENCE, § 437.

[14] Woolam *v.* Hearn, *supra;* Safe Deposit Co. *v.* Diamond, etc., Co., *supra;* Davis *v.* Ely, *supra.*

[15] Macomber *v.* Packham, *supra;* Wirtz *v.* Guthrie, *supra.*

[16] Macomber *v.* Peckham, *supra.*

[17] Glass *v.* Hulbert, *supra.*